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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1973

243.25 ACRES OF LAND, MORE OR LESS, IN THE COUNTY OF IMPERIAL, STATE OF CALIFORNIA; GLADYS GRANNIS, ALSO KNOWN AS GLADYS GRANNIS MORGAN, A WIDOW, et al, and UNKNOWN OTHERS,

Defendants,

CARL C. ANDERSON, SR. AND MARIE JO ANDERSON,

Petitioners,

VS.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered in the above case on March 29, 1974.

OPINIONS BELOW

The opinion of the District Court for the Southern District of

California entering an interlocutory order upon the issue of title only, concluding that as of the date of taking in condemnation, March 11, 1966, the United States owned condemnation parcels 6 and 7, is printed in Appendix A hereto. The opinion of the Court of Appeals for the Ninth Circuit, which affirmed the judgment of the District Court, is printed in Appendix B hereto and is not yet reported in the official reports.

JURISDICTION

The judgment of the Court of Appeals, printed in Appendix B hereto, was entered on March 29, 1974. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

THE QUESTIONS PRESENTED

1. Whether the quantity of land conveyed by federal patent is determined as of the time of the homestead entry or as of the date of the patent.

2. Whether a homestead entry which was riparian to the Colorado River at the time of entry, but not riparian at the time the federal patent was issued, is entitled to the accretions added thereto subsequent to the homesteader's entry.

STATUTES AND RULES

The basic action was one of condemnation brought by the United States under authority of 40 U.S.C. § 258(a), original jurisdiction of which rests in the district courts under 28 U.S.C. § 1358 (eminent domain). Under 43 U.S.C. § 166, the right of settling in good faith for the purpose of claiming a homestead relates back to the date of settlement. State statutes involved are: California Civil Code § 830 and California Civil Code § 1014. These provisions are printed in Appendix C hereto.

STATEMENT

This is a condemnation proceeding instituted by the United States as plaintiff for the purpose of acquiring river frontage lands for use in rechanneling and building a levee system along the Colorado River in the Palo Verde-Cibola Valley area, in Imperial County, California. Original jurisdiction of all proceedings to condemn real estate for the use of the United States or its departments or agencies rests with the district courts under 28 U.S.C. § 1358.

Farm lands owned or occupied by the petitioners herein, Carl C. Anderson, Sr. and Marie Jo Anderson, which were formerly riparian along the west bank of the Colorado River, were taken in the condemnation action and the District Court for the Southern District of California found title to the land designated Parcels 6 and 7 to be in the Government so that no award of compensation was made. The District Court's order of November 17, 1972 certified that it was of the opinion that the judgment "involves a controlling question of Law or questions of Law as to which there is substantial ground for difference of opinion, and an immediate appeal from this Judgment on the Issue of Title will materially advance the ultimate termination of the litigation. (28 U.S.C. Section 1292(b))." Petitioners, herein, on November 27, 1972, filed in the United States Court of Appeals for the Ninth Circuit a timely Petition for Leave to Appeal under 28 U.S.C. § 1292(b), which was granted on December 13, 1972.

The condemnation parcel in issue consists of approximately 25.6 acres identified as Parcel No. 7. The parties agree, and the District Court so found and held, that the lands in question were formed by the accretive process due to gradual changes in the River's location.

Petitioners' predecessor in title was one Randolph who made a

homestead entry on November 12, 1926 on 120 acres of land described as in Section 26, Township 9 South, Range 21 East, of the San Bernardino Base and Meridian, Imperial County, California. Patent for said lands was issued to Randolph on January 23, 1932.

Anderson asserts title to the condemnation parcel of 25.6 acres upon the basis that the evidence established that in 1926, the date upon which Randolph made his homestead entry on the 120 acres in Section 26, a part of that land was riparian to the Colorado River and the condemnation parcel was formed by accretions to the entry land.

Evidence established and the District Court found that a portion of the Southeast Quarter of the Southeast Quarter of Section 26 was riparian to the River in the year 1924 and petitioner contends that the evidence clearly shows that upon the date of entry in 1926, the land of his predecessor, Randolph, was riparian. Although requested, the District Court failed to make a finding as to its riparian status during the year 1926.

The River at the point in question was moving continuously in a Southeasterly direction and it was found that at the time of the issuance of the patent in 1932, no part of Section 26 was riparian to the River. The government claims title by accretion to the land which it owned in Section 25, and asserts that the condemnation Parcel 7 instead of being accretive to Section 26, accreted to adjoining lands originally surveyed as Section 25 which were never patented out.

The Court of Appeals affirmed the judgment of the trial court, holding that it was the *date of the patent* and not the *date of entry* of the homestead which controlled the nature and extent of ownership. Because none of the land in question was riparian at the time of the date of the patent, the petitioners were denied

an award of compensation.

REASONS FOR GRANTING THE WRIT

The decision below of the Court of Appeals for the Ninth Circuit raises serious questions as to the status of the law with respect to land owners involved with accretive rights and the subsequent condemnation of that land by the United States Government. The decision of the Court of Appeals is in conflict with other decisions of the Federal Courts with respect to the property and estate conveyed under a patent and is in conflict with the applicable law of the State of California with respect to the rights of landowners concerning accretions. The Court of Appeals for the Ninth Circuit has decided an important question of federal law affecting that fundamental area of property rights which is in conflict with applicable decisions of this Court.

I

The Court of Appeals below placed great emphasis on and followed the decision in *United States* v. *62.57 Acres of Land in Yuma County, Arizona,* 449 F.2d 5 (9th Cir. 1971) where the Court held it was the date of patent and not the date of entry which controlled the nature and extent of ownership—such ownership being set out in the patent itself.

The holding by the Ninth Circuit is in contravention not only with Federal Court decisions, but also with the decision of this Court itself. In the leading case, *Jefferis v. East Omaha Land Co.,* 134 U.S. 178, 33 Law.Ed. 872 (1889) the Court considered the question of the nature and extent of ownership in the patent described as Lot 4, containing 37.24 acres, according to the official plat of the survey of the land. The land was entered in 1853 and patented in June, 1855 as Lot 4. From 1853 to 1870 more

than forty (40) acres had been formed by accretion to Lot 4. The Court held that ". . . the patent passed the title of the United States to Lot 4, not only as it was at the time of the survey in 1851, but as it was at the date of the patent in 1855, so that the United States did not retain any interest in any accretion formed between the survey in 1851 and the date of the patent." The Court went on to say, "We are, therefore, of opinion, that the patent on June 15, 1855, which described the land conveyed as Lot 4, according to the official plat of the survey, of which a copy is annexed to the bill, marked Exhibit 'A', conveyed to the patentee the title to all accretion which had been formed up to that date." It would seem clear from this wording that the entryman is entitled to all accretions added from the time of his entry.

The conclusion reached by the Ninth Circuit in the *United States* v. *62.57 Acres of Land in Yuma County, Arizona* case that the date of the patent controlled the size of the estate which the patentee acquired, we respectfully submit, is not consistent with the Court's decision in the *Jefferis* case and violates the well-settled rule of law as decided by the Court in the *Jefferis* case that a riparian owner is entitled to all accretions because he must also bear his loss in the same way.

The general rule is clear that if lands are formed and attach to riparian lands as a result of slow and imperceptible river movements, such process is accretive in nature and thereby attaches legally to the riparian ownership. *St. Louis* v. *Rutz,* 138 U.S. 226, 11 S.Ct. 337 (1891); *Philadelphia Co.* v. *Stimson,* 223 U.S. 605, 32 S.Ct. 340 (1912).

There are other Federal Court decisions that have ruled that the date of entry on patented lands is the controlling date to ascertain the nature and extent of the ownership of any accretions that form to the riparian lands. *Mecca Land and Exploration Co.*

v. *Schlecht,* 4 F.2d 256 (D.C. Ariz. 1925). *United States* v. *11,993.32 Acres of Land,* 116 F.Supp. 671 (D.C., N.D. 1953).

Closely in point is *United States* v. *11,993.32 Acres of Land supra,* and is in accord with the holding in the *Jefferis* case. Here the lands subsequently patented were riparian to the Missouri River when originally surveyed, and substantial accretions developed between the date of survey and the dates of homestead entry and the later patent. The Court held that, where between the date of the survey and the patents a substantial strip of realty was formed by accretion between a meander line as shown on the official plat of survey and the actual bank of the river, patent conveyances "according to official plat" carried with them the right to realty formed by accretion as well as hazard of loss by erosion, and the government did not have title to the realty formed by accretion.

The Court went on to speak of intention of the parties and stated that, ". . . If there was an intention here to limit the conveyances by the exclusion of accretions, such intentions could easily have been evidenced by including the words 'without accretions' in the patents."

While the Ninth Circuit with their discussion in the *Yuma* case attempted to reach an equitable solution under the facts then presented, such a decision when applied to other factual situations becomes inequitable and is inconsistent with the decisions of this Court and other Federal Courts.

Petitioner contends that the Ninth Circuit Court's decision in the *Yuma* case is distinguishable in its unique factual circumstances. In that case, which also involved the Colorado River, but with lands situated in Yuma County, Arizona, the property as originally surveyed and at the time the homesteaders made their entries was nonriparian. The Appellate Court recognized

and distinguished the fact situation by stating: "The difference between *Jefferis* and the case now before us is that here there was no boundry marked by the Colorado River as of the date of entry or survey."

In the instant case, as in the *Jefferis* case, there *was* a boundary marked by the river as of the date of entry or survey. The patented land was subject to the accretive process between the date of entry and date of patent and the patentee, in accord with the *Jefferis* case, obtained title to all accretions which had been formed subsequent to the date of entry.

In construing the Government patent to Randolph and the succeeding deeds in the chain of title to Anderson, petitioner submits the conveyances carried with them the appurtenant accretions, and by reason thereof, Anderson is the owner of condemnation Parcel No. 7.

In addition, the Ninth Circuit Court decision in the instant case erodes the meaning and intent of the relation-back doctrine under 43 U.S.C. 166, where the rights of settling in good faith for the purpose of claiming a homestead relates back to the date of settlement. A patent relates back to the time of original location and entry and protects the patentee's right to the exclusion of all adverse intervening claims. *Osborn* v. *Froyseth,* 216 U.S. 571, 30 S.Ct. 420 (1910).

The Court in *Knapp* v. *Alexander-Edgar Lumber Company,* 237 U.S. 162 (1915) held that when a homesteader has a preferential right to the land, and when he receives a patent vesting in him the complete legal title, it relates back to the date of the initiatory act so as to cut off intervening claimants. The Court in *Gibson* v. *Chouteau,* 13 Wall. 92, 100 (1871), regarding the meaning of the relation-back doctrine also stated: "By the doctrine of relation is meant the principle by which an act done at one

time is considered by a fiction of law to have been done at some antecedent period. It is usually applied when several proceedings are essential to complete a particular transaction, such as a conveyance or deed. The last proceeding which consummates the conveyance is held for certain purposes to take effect by relation as of the day when the first proceeding was held." In the instant case, the patent would take effect as of the day of entry of homestead and thus pass all interest of the United States on that day and petitioner would be entitled to accretive lands.

II

In *Harden* v. *Jordan,* 140 U.S. 371, 11 S. Ct. 808 (1891), it was held that United States patents to lands bounded by streams, in the absence of reservation or restriction of terms, are to be construed as to their effect according to the law of the state in which the land lies. See also *Fontenelle* v. *Omaha Tribe of Nebraska,* 430 F.2d 143 (D.C. Nebr. 1969), holding that even though a claim is based upon a grant from the U.S., the boundary of land on waters and streams is a matter determined by the law of the state in which the land is situated. Citing *Whitaker* v. *McBride,* 197 U.S. 510, 25 S.Ct. 530 (1905).

The California Civil Code provides as follows:

§ 1014. Alluvion.

"Where, from natural causes, land forms by imperceptible degrees, upon the bank of a river or stream, navigable or not navigable, either by accumulation of material or by the recession of the stream, such land belong to the owner of the bank, subject to any existing right of way over the bank."

§ 830. Boundaries by water.

"Except where the grant under which the land is held indicates a different intent, the owner of the upland, when it borders upon a navigable lake or stream, where there is no tide, the owner takes to the edge of the lake or stream, at low-water mark; when it borders upon any other water, the owner takes

to the middle of the lake or stream."

California law provides that a conveyance of real property will transfer and convey all accretions to the fee title ownership absent any contrary showing. *Tappendorff* v. *Downing*, 76 Cal. 169, 18 P. 247 (1888).

CONCLUSION

The holding in the instant case by the Court of Appeals for the Ninth Circuit and its conclusion of law in *U.S.A.* v. *62.57 Acres of Land in Yuma County, Arizona, Ft. Yuma Land & Investment, Inc. et al,* supra, that the date of patent and not the date of entry controlled the nature and extent of ownership is contrary to significant holdings of this Court over a period of years. Cases have held that patent has passed title to property that the Government has at the time of survey in addition to accretion lands on the date of patent. The decision of the Ninth Circuit on the issues of law here presented which held that the quantity of land conveyed by federal patent is determined as of the time of the date of patent, and that a homestead entry which was riparian to the Colorado River at the time of entry, but not riparian at the time the patent was issued, is not entitled to accretions added thereto subsequent to the homesteader's entry, should be corrected by the Court as being contrary and inconsistent with prior law.

The petition for certiorari should be granted.

Respectfully submitted,

ASARO & KEAGY
BY: ROSCOE D. KEAGY
Counsel for Petitioners

APPENDIX A

APPENDIX A

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA, *Plaintiff,* v. 243.25 ACRES OF LAND, MORE OR LESS, IN THE COUNTY OF IMPERIAL, STATE OF CALIFORNIA, etc., el al., *Defendants.*	**Civil No. 3505-SD-Smith**

JUDGMENT ON THE ISSUE OF TITLE ONLY

The Court having on November 6, 1972, herein filed its Amended Findings of Fact and Conclusions of Law,

NOW THEREFOR, IT IS ORDERED, ADJUDGED, AND DECREED:

1. That plaintiff, UNITED STATES OF AMERICA, has been and is the owner in fee simple title absolute of the lands described and designated in the above-captioned action as Parcels 5, 6 and 7. Accordingly, no compensation is payable by plaintiff herein for the taking of said Parcels 5, 6 and 7, and IT IS ORDERED that the sum of one dollar ($1.00) deposited with the Declaration of Taking on March 11, 1962 for said Parcels 5, 6 and 7 be returned to the Treasurer of the United States.

2. That on March 11, 1966, the Date of the Taking herein, CARL C. ANDERSON, SR., and MARIE JO ANDERSON, were the owners of the lands described and designated as Parcel 2, and are entitled to be paid just compensation therefor by plaintiff.

3. That on said Date of the Taking, CARL C. ANDERSON, SR., was the owner of the lands herein described and designated

as Parcel Number 3, and is entitled to be paid just compensation therefore by plaintiff.

4. That on aforesaid Date of the Taking, the defendant, THE STATE OF CALIFORNIA, was the owner in fee simple title of a Portion of Parcel 4 as said parcel is described in the Complaint as follows:

Commencing at section corner common to Sections 25, 26, 36, 35, T. 9S., R. 21 E., S.B.N.; thence East 1716 feet; thence S.44° 39′ 16″ E. 6188.68 feet; thence S. 06° 46′ 42.5″ W. 190 feet to the True Point of Beginning; thence, from said True Point of Beginning, S. 06° 46′ 42.5″ W. 285.32 feet to a point on the centerline of the 1940 channel of the Colorado River; thence, following said centerline, along the following courses: N.57° 12′ 33″ E.235.98 feet, N. 45° 30′ E. 205 feet, N. 67° 25′ E. 205 feet and N. 44° 00′ E. 175 feet; thence leaving said centerline along the following courses: N. 21° 58′ 45″ W. 75 feet and N. 08° 28′ 45″ E. 298 feet; thence, along the northerly bank of the 1940 channel of the Colorado River, the following courses: S.44° W. 469 feet, S. 67° 25′ W. 138 feet, S. 45° 30′ W. 200 feet and S. 57° 12′ 33″ W. 50 feet, more or less to the Point of Beginning, containing 4.2 acres more or less.

The STATE OF CALIFORNIA is entitled to be paid proportionate just compensation for the taking of said Portion of Parcel 4 by plaintiff.

5. That on said Date of the Taking, the defendant, CARL C. ANDERSON, SR., was the owner of the remaining 3.48 acres of land comprising Parcel 4, as it is described in plaintiff's Complaint in Condemnation, and is entitled to be paid just compensation for the taking thereof by plaintiff.

6. The defendants, WILLIAM B. HORNE and CLARA

HORNE, did not on the Date of the Taking own any lands condemned in the above-captioned proceeding and are not entitled to be paid any compensation herein.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED:

1. That this Judgment on the Issue of Title Only As to Parcels 6 and 7, ownership of which has been herein alleged and herein urged by the defendants, CARL C. ANDERSON, SR., et al., involves a controlling question of Law or questions of Law as to which there is substantial ground for difference of opinion, and an immediate appeal from this Judgment on the Issue of Title will materially advance the ultimate termination of the litigation. (28 U.S.C. Section 1292[b]).

2. Pursuant to Rule 62(a) of the Federal Rules of Civil Procedure, the enforcement of this Judgment on the Issue of Title Only, and all further proceedings herein shall be stayed until determination of any appeal from this Judgment on the Issue of Title Only. This Judgment shall not prevent any Stipulation for a proportionate award of just compensation between plaintiff and THE STATE OF CALIFORNIA for its interest in Parcel 4.

DATED: This 13th day of November, 1972.

/s/ Russell E. Smith
United States District Court Judge

APPENDIX B

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
v.
243.25 ACRES OF LAND, MORE OR LESS, IN THE COUNTY OF IMPERIAL, STATE OF CALIFORNIA; GLADYS GRANNIS, ALSO KNOWN AS GLADYS GRANNIS MORGAN, A WIDOW, *et al.*, and UNKNOWN OWNERS,
Defendants,
CARL C. ANDERSON, SR. and MARIE JO ANDERSON,
Defendants-Appellants.

No. 72-3140
MEMORANDUM

Appeal from the United States District Court
from the Southern District of California

Before: WRIGHT and TRASK, Circuit Judges, and BYRNE, SR.,* District Judge

This is an appeal from an interlocutory order of the District Court pursuant to 28 U.S.C. § 1292(b). The basic action was one of condemnation under 28 U.S.C. § 1358 (eminent domain), and the court's order found title to the land in question to be in the Government so that no award of compensation was made. Carl C. Anderson, et al. (Anderson), who had asserted title and

*Hon. William M. Byrne, Sr., Sr. United States District Judge for the Central District of California, sitting by designation.

Judge Byrne participated in the argument and the conference on this case and agreed with the result, but did not participate in the final opinion having died on March 9, 1974.

a right to compensation, appealed. We affirm the order of the trial court.

The condemnation parcel in issue consists of approximately 25.6 acres within Lot 7 of Section 25 (as shown by a 1961 official survey), Township 9 South, Range 21 East, of the San Bernardino Base and Meridian, County of Imperial, State of California.

Appellants' predecessor in title was one Randolph who made a homestead entry in 1926 on 120 acres of land described as in Section 26, Township 9 South, Range 21 East, of the San Bernardino Base and Meridian, Imperial County, California.[1] Patent was issued June 23, 1932, to Randolph. Imperial County acquired the land from Randolph and in 1962 conveyed it to Anderson. Title to the condemnation parcel of 25.6 acres is asserted by Anderson upon the basis that the evidence established that in 1926, when Randolph made his homestead entry on the 120 acres in Section 26, a part of that land was riparian to the Colorado River and the condemnation parcel was acquired through the process of accretion to that entry land over the years. The Government claims title by accretion to the land which it owns in Section 25.

The parties agree that whatever changes have occurred in the river's course to cause changes in title have occurred through the process of accretion. They appear to agree also that in the year 1924, or two years prior to the entry of Randolph, a portion of the $SE^{\frac{1}{4}}SE^{\frac{1}{4}}$ of Section 26 was riparian to the river. The court has found, upon evidence which was largely undisputed, that between 1924 and 1932 when patent issued, the river at the point in question was moving continuously in a southeasterly direction. It also found that at the time of the issuance of the patent in

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[1] $W^{\frac{1}{2}}SE^{\frac{1}{4}}$ and the $SE^{\frac{1}{4}}SE^{\frac{1}{4}}$ of Section 26.

1932, no part of Section 26 was riparian to the river. It would necessarily follow on the basis of our decision in *United States* v. *62.57 Acres of Land in Yuma County, Arizona,* 449 F.2d 5 (9th Cir. 1971), that Anderson's predecessor in title acquired by his patent the W^2SE^4 and the SE^4SE^4 of Section 26, Township 9 South, Range 21 East, of the San Bernardino Meridian, Imperial County, California. None of that land was riparian and the movement of the river has had no accretive effect upon it since patent issued.

Appellant contends that the evidence clearly shows that upon the date of entry in 1926, the land of his predecessor, the entryman, was riparian. There was a sharp division in the testimony on this issue and we cannot here predict what finding a trier of fact might make concerning it. However, we held in *United States* v. *62.57 Acres of Land in Yuma County, Arizona, supra,* that it was the date of patent and not the date of entry which controlled the nature and extent of ownership and such ownership was set out in the patent itself. Appellant's effort to distinguish *62.57 Acres* is not persuasive and we must adhere to it.

The judgment of the trial court is AFFIRMED.

APPENDIX C

40 U.S.C. § 258a. Same; lands, easements, or rights-of-way for public use; taking of possession and title in advance of final judgment; authority; procedure

In any proceeding in any court of the United States outside of the District of Columbia which has been or may be instituted by and in the name of and under the authority of the United States for the acquisition of any land or easement or right of way in land for the public use, the petitioner may file in the cause, with the petition or at any time before judgment, a declaration of taking signed by the authority empowered by law to acquire the lands described in the petition, declaring that said lands are thereby taken for the use of the United States. Said declaration of taking shall contain or have annexed thereto—

(1) A statement of the authority under which and the public use for which said lands are taken.

(2) A description of the lands taken sufficient for the identification thereof.

(3) A statement of the estate or interest in said lands taken for said public use.

(4) A plan showing the lands taken.

(5) A statement of the sum of money estimated by said acquiring authority to be just compensation for the land taken.

Upon the filing said declaration of taking and of the deposit in the court, to the use of the persons entitled thereto, of the amount of the estimated compensation stated in said declaration, title to the said lands in fee simple absolute, or such less estate or interest therein as is specified in said declaration, shall vest in the United States of America, and said lands shall be deemed to be condemned and taken for the use of the United States, and the right to just compensation for the same shall vest in the

persons entitled thereto; and said compensation shall be ascertained and awarded in said proceeding and established by judgment therein, and the said judgment shall include, as part of the just compensation awarded, interest at the rate of 6 per centum per annum on the amount finally awarded as the value of the property as of the date of taking, from said date to the date of payment; but interest shall not be allowed on so much thereof as shall have been paid into the court. No sum so paid into the court shall be charged with commissions or poundage.

Upon the application of the parties in interest, the court may order that the money deposited in the court, or any part thereof, be paid forthwith for or on account of the just compensation to be awarded in said proceeding. If the compensation finally awarded in respect of said lands, or any parcel thereof, shall exceed the amount of the money so received by any person entitled, the court shall enter judgment against the United States for the amount of the deficiency.

Upon the filing of a declaration of taking, the court shall have power the fix the time within which and the terms upon which the parties in possession shall be required to surrender possession to the petitioner. The court shall have power to make such orders in respect of encumbrances, liens, rents, taxes, assessments, insurance, and other charges, if any, as shall be just and equitable. Feb. 26, 1931, c. 307, § 1, Stat. 1421.

43 U.S.C. § 166. Time for settlers to file application and to perfect entry; marriage of entrywoman; preferential right of entry.

Any settler who has settled, or who shall hereafter settle, on any of the public lands of the United States, whether surveyed or unsurveyed, with the intention of claiming the same under the homestead laws, shall be allowed the same time to file his

homestead application and perfect his original entry in the United States Land Office as allowed on May 14, 1880, to settlers under the then existing preemption laws to put their claims on record, and his right shall relate back to the date of settlement, the same as if he settled under such preemption laws.

Where an unmarried woman who has heretofore settled, or may hereafter settle, upon a tract of public land, improved, established, and maintained a bona-fide residence thereon, with the intention of appropriating the same for a home, subject to the homestead law, and has married, or shall thereafter marry, before making entry of said land, or before making application to enter said land, she shall not on account of her marriage forfeit her right to make entry and receive patent for the land: *Provided,* That she does not abandon her residence on said land, and is otherwise qualified to make homestead entry: *Provided further,* That the man whom she marries is not, at the time of their marriage, claiming a separate tract of land under the homestead law: *Provided further,* That any settler upon lands designated by the Secretary of the Interior as subject to the provisions of subsections (a)-(e), of section 218 of this title and subsections (a)-(e), of section 219 of this title, shall be entitled to the preference right of entry accorded by this section, provided he shall have plainly marked the exterior boundaries of the lands claimed as his homestead: *And provided further,* That after the designation by the Secretary of the Interior of public lands for entry under the nonresidence provisions of the Enlarged Homestead Acts, sections 218 and 219 of this title, any person who shall have plainly marked the exterior boundaries of the lands claimed under said provision of law and made valuable improvements thereon shall have a preference right to enter the lands so claimed and improved at any time within three months after the date on

which such lands become subject to entry; but such right shall forfeit unless the settler or claimant under the provisions of the Enlarged Homestead Acts shall annually cultivate and improve the lands in the form and manner and to the extent therein required following date of initiation of his claim hereunder. May 14, 1880, c. 89, § 3, 21 Stat. 141; June 6, 1900 c. 821, 31 Stat. 683; Aug. 9, 1912, c. 280, 37 Stat. 267.

28 U.S.C. § 1358. Eminent Domain:

"The district courts shall have original jurisdiction to condemn real estate for the use of United States or its departments or agencies."

California Civil Code

§ **1014.** Alluvion.

"Where, from natural causes, land forms by imperceptible degrees, upon the bank of a river or stream, navigable or not navigable, either by accumulation of material or by the recession of the stream, such land belongs to the owner of the bank, subject to any existing right of way over the bank."

§ **830.** Boundaries by water.

"Except where the grant under which the land is held indicates a different intent, the owner of the upland, when it borders on tidewater, takes to ordinary high-water mark; when it borders upon a navigable lake or stream, where there is no tide, the owner takes to the edge of the lake or stream, at low-water mark; when it borders upon any other water, the owner takes to the middle of the lake or stream."

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1973

UNITED STATES OF AMERICA,
Appellee,
vs.
243.25 Acres of Land, More or Less in the County of Imperial, State of California, etc., et al.,
Appellants.

Certificate of Service

I hereby certify that on this 24th day of May, 1974, three copies of the Petitioners' Brief for Writ of Certiorari were mailed, postage prepaid, to each of the following named persons:

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I further certify that all parties required to be served have been served.

ROSCOE D. KEAGY
Attorney for Petitioner

In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1774

CARL C. ANDERSON, SR. AND MARIE J. ANDERSON,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

The United States condemned certain of petitioners' land for use in rechanneling a portion of the Colorado River in Imperial County, California (Pet. 3). The ownership of most of the land was not in dispute, but petitioners claimed ownership of some 25.6 acres which the government claimed already to own (see Pet. 4). The basis of petitioners' claim was that their principal tract was riparian at the time their ancestor in title made his homestead entry, and that the disputed land had become part of it through accretion.

The district court found that regardless of whether the land was riparian at the time of entry (which was disputed) it was not riparian at the time the patent was issued to petitioners' ancestor, and that the patent and survey on which the patent was based show it as non-

riparian (Pet. App. B pp. vi-vii).[1] The court concluded that the patent was controlling and that the land in dispute belongs to the United States (Pet. App. A). The court of appeals affirmed, holding that the extent of ownership was controlled by the patent (Pet. App. B).

The decision of the court of appeals is correct and presents no conflict with decisions of other courts of appeals nor any question warranting review by this Court. The court relied on its previous decision in *United States* v. *62.57 Acres of Land in Yuma County, Ariz.*, 449 F. 2d 5 (C.A. 9), which held that insofar as the patent agrees with the survey (the situation here) the land's boundaries are fixed at the time of patent, not entry. That decision, and the present decision, are consistent with this Court's rule that the extent of a grant is controlled by the patent finally issued, rather than by the land entered. *Dominquez De Guyer* v. *Banning*, 167 U.S. 723, 743.

The cases cited by petitioners are not in conflict with this holding. Rights to alluvion accrue only to riparian owners, and the patent upon which petitioners' title is based shows that they were not riparian owners.

The petition for a writ of certiorari should be denied.

Respectfully submitted.

ROBERT H. BORK,
Solicitor General.

WALLACE H. JOHNSON,
Assistant Attorney General.

JACQUES B. GELIN,
EVA R. DATZ,
Attorneys.

JULY 1974.

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[1]We are lodging with the Clerk a copy of the relevant findings of fact and conclusions of law.